20275 SERVICE DATE - APRIL 1, 1999
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41265

SMITHKLINE BEECHAM CONSUMER HEALTHCARE
v.
JONES TRUCK LINES, INC.

Decided: March 26, 1999

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Western District of Pennsylvania in Jones Truck Lines, Inc. v. Beecham, Inc., d/b/a SmithKline Beecham Consumer Brands, successor in interest to Norcliff Thayer, Inc., Civil Action No. 93-1074. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or defendant), a former motor common and contract carrier, to collect undercharges from SmithKline Beecham Consumer Healthcare (Beecham or complainant). Jones seeks undercharges of $63,433.79, plus interest, allegedly due, in addition to amounts previously paid, for services rendered in transporting 1,073 shipments of drugs, medicines, or toilet preparations between July and December of 1988.[2] By

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The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

Jones originally sought undercharges of $63,543.98. Defendant subsequently modified its claims with respect to 14 shipments and adjusted its total claim for undercharges to $63,443.79.

order dated April 18, 1994, the court stayed the proceeding and referred the issue of rate reasonableness to the ICC for determination.[3]

Pursuant to the court order, Beecham, by complaint filed June 7, 1994, requested the ICC to resolve issues of rate reasonableness and unreasonable practice. By decision served July 21, 1994, a procedural schedule was established for development of the record. On September 19, 1994, complainant filed its opening statement. Defendant filed its statement of facts and argument on October 19, 1994, and Beecham filed its rebuttal on November 8, 1994.

Beecham contends that the attempt by Jones to collect undercharges in this proceeding constitutes an unreasonable practice under section 2(e) of the NRA and that the charges Jones seeks to assess are unreasonably high.

Beecham claims that it engaged in negotiations with Jones that resulted in Jones agreeing to provide complainant with a 30% discount when handling Beecham's traffic. Complainant asserts that Jones published the discounted rate in Tariff ICC JTLS 605-D and later, without informing Beecham or republishing the rate in another tariff, canceled the discount tariff, effective March 28, 1988. Beecham states, however, that Jones continued to bill and collect the negotiated discount rate throughout the July-to-December 1988 period here at issue. Further, complainant notes that on April 25, 1989, Jones published a new rate setting forth a 45% discount for the subject traffic.

Beecham supports its position with an affidavit from Timothy M. Carpenter, its Distribution Administration Manager. Mr. Carpenter states that he was involved in negotiations with Jones that resulted in an agreement whereby Jones was to provide Beecham with a 30% discount off its class rates during the involved period.[4] According to Mr. Carpenter, Beecham relied upon the negotiated 30% discount in tendering the subject shipments to Jones. He asserts that Jones originally billed at the 30% discount level and accepted Beecham's payment of the assessed discounted rate, that similar discount rates were available from other motor carriers during the relevant time period, and that Beecham would not have shipped its traffic via Jones had the carrier attempted to assess the full, undiscounted rates it is here seeking to collect.

Attached to Mr. Carpenter's statement are 10 representative "corrected" freight bills issued to complainant on behalf of defendant that contain original freight bill data as well as asserted

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The court administratively closed the proceeding subject to reopening upon motion by either party.

Prior to the agreement Jones had provided Beecham with a 25% discount when handling that shipper's traffic.

balance due amounts (Exhibit A).[5] The "corrected" bills indicate that a 30% discount was originally applied to each of the representative shipments and that the "corrected" freight bills disallowed all discounts and in certain instances rerated the originally assessed charge. Also attached to Mr. Carpenter's statement is a copy of an internal memo dated October 3, 1986, from Mr. Carpenter to his supervisor stating that the 30% discount had gone into effect subject to a minimum charge of $34 (Exhibit B); a copy of Jones' tariff No. ICC JTLS 605-D, indicating that a 30% discount was to be applied to complainant's shipments, effective September 29, 1986, (Exhibit B); a copy of a document entitled "Transportation Agreement" signed by a representative of Jones indicating that effective June 30, 1987, a 30% discount subject to a minimum charge of $35 would apply to Beecham shipments (Exhibit C); and a copy of a 3rd Revised Title Page issued March 8, 1988, canceling tariff ICC JTLS No. 605-D, effective March 21, 1988 (Exhibit F).

Jones maintains that the unreasonable practice defense applies only to claims stemming from unfiled rates and that since the discount agreed upon was published in a tariff that was lawfully and timely filed, section 2(e) is not applicable to the situation here being considered. Respondent claims that complainant is attempting to expand the applicability of section 2(e) to encompass properly filed tariff rates that are subsequently canceled. Jones argues that this is not an unfiled rate situation, and that to accept Beecham's position would effectively freeze a carrier's tariff rates. Further, Jones contests the applicability of section 2(e) of the NRA on statutory construction and constitutional grounds.[6] Finally, Jones argues that the undiscounted rates have not been shown to be unreasonable.

A complete set of the 1,073 rerated freight bills issued on behalf of Jones was also submitted by Beecham as an appendix to its opening statement.

Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered defendant's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir. 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); cf. Jones Truck Lines, Inc. v.

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Jones supports its assertions with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carriers Services, Inc., the auditing firm authorized by the Bankruptcy Court to provide rate auditing and collection services for Jones. Mr. Swezey maintains that Jones did not have an applicable discount in effect between March 21, 1988, and April 25, 1989, a period during which the subject shipments were transported. As a consequence, corrected freight bills eliminating the inapplicable 30% discount allowance were issued. Mr. Swezey also notes that Beecham did not sign the 1987 "Transportation Agreement" referred to by Mr. Carpenter, asserting that it therefore could not be an agreement between the parties. Finally, Mr, Swezey asserts that the undiscounted rates were not unreasonable, and submits supporting evidence indicating that Jones transported a number of shippers at undiscounted class rates.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.[7]

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Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to defendant's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as defendant's "separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D. Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

At the outset, we note that not only does Jones concede that the originally assessed and billed discount rates were at one time contained in lawfully filed tariffs, it argues that this fact alone precludes use of section 2(e) here. Jones claims, in essence, that once a negotiated rate is filed, section 2(e)'s use is statutorily precluded. We do not believe section 2(e) must be read this narrowly. Indeed, whether a negotiated rate was at one time on file is not a determining factor. The statute itself does not limit section 2(e)'s availability to situations where the originally billed rate was unfiled; nor is its use precluded when a filed rate is unilaterally canceled. Rather, in evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to

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Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[8]

It is undisputed that Jones no longer transports property.[9] Accordingly, we may proceed to determine whether the defendant's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains 10 representative "corrected" freight bills (as well as a complete set of the rerated "balance due" freight bills) indicating initially assessed charges to which a 30%

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the involved shipments because the carrier canceled the rate, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA." American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995). Here, the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments because the rates were unilaterally canceled by Jones. The evidence clearly indicates that the parties negotiated a discount rate; that Beecham reasonably relied upon that rate in tendering its traffic to Jones; and that Jones continued to bill, and collect the negotiated rate notwithstanding cancellation of the published tariff rate. These circumstances set in motion the provisions of the NRA.

[8] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[9] Board records confirm that Jones' motor carrier operating authorities were revoked on February 18, 1992.

discount was applied; a copy of a complainant internal memo dated October 3, 1986, stating that a 30% discount had gone into effect subject to a stated minimum charge; a copy of Jones' tariff No. ICC JTLS 605-D, indicating that a 30% discount was to be applied to complainant's shipments, effective September 29, 1986; and a 1987 transportation agreement signed by a representative of Jones indicating that a 30% discount subject to a minimum charge would apply to Beecham shipments. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E. A. Miller).[10] See William J. Hunt Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C. A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Jones and paid by Beecham. The representative balance due bills as well as other written references revealing the consistent

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Jones at pp.11-12 of its reply statement argues that freight bills cannot be used to satisfy the written evidence requirement. Defendant contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine the freight bills to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See E.A. Miller, supra, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

application of a 30% discount to originally assessed rates, together with the acknowledgment by Jones that the rates in question were negotiated with Beecham, confirm the testimony of Mr. Carpenter and reflect the existence of negotiated rates. The evidence further indicates that Beecham relied upon the agreed-to discount rates in tendering the subject shipments to Jones, and that petitioner would not have used the defendant's services had Jones attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, defendant concedes (reply statement at p. 9) that if section 2(e) is read to apply to this case, it will preclude the trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate was offered to Beecham by Jones; that Beecham, reasonably relying on the offered rate, tendered the subject traffic to Jones; that the negotiated rate was billed and collected by Jones; and that Jones now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Beecham for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on the date of service.

3. A copy of this decision will be mailed to:

The Honorable Donetta W. Ambrose
United States District Court for the
Western District of Pennsylvania
P.O. BOX 1805
Pittsburgh, PA 51230

Re: Case No. 93-1074

No. 41265

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary